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In the Supreme Court of the United States

OCTOBER TERM, 1929

FRANK K. BOWERS, AS COLLECTOR OF INTERNAL REVENUE FOR THE SECOND DISTRICT OF THE STATE OF NEW YORK, PETITIONER

v.

NEW YORK LIFE INSURANCE COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF

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No. ——

FRANK K. BOWERS, AS COLLECTOR OF INTERNAL REVENUE for the Second District of the State of New York, petitioner

v.

NEW YORK LIFE INSURANCE COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF

PETITION

The Solicitor General, on behalf of Frank K. Bowers, as Collector of Internal Revenue for the Second District of the State of New York, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Second Circuit entered March 10, 1930 (R. 173), in so far as said judgment is adverse to your petitioner.

Respondent has made application to this Court for a writ of certiorari on the question whether or

not it is subject to the capital stock tax imposed by Section 1000 (c) of the Revenue Act of 1918 for the periods ending June 30, 1919, June 30, 1920, and June 30, 1921, decided adversely to it by said Circuit Court of Appeals. Petitioner, conceding that this question is of public importance, represents to the Court that there is another question in this case, which is of equal public importance, namely, whether by reason of the provisions of the Revenue Act of 1921 respondent was relieved from the payment for the period beginning July 1, 1921, and ending June 30, 1922, of capital stock taxes imposed upon mutual life insurance companies by Section 1000 (c) of the Revenue Act of 1918.

STATEMENT

Respondent, a corporation transacting the business of life insurance on the purely mutual, level premium plan, brought suit in the District Court of the United States for the Southern District of New York, seeking recovery of capital stock taxes assessed and collected under the provisions of Section 1000 (c) of the Revenue Act of 1918 for the periods ending June 30, 1919, June 30, 1920, June 30, 1921, and June 30, 1922. (R. 2–27, 60.)

The District Court held that respondent was subject to the capital stock taxes imposed upon mutual life insurance companies by Section 1000 (c) of said Revenue Act of 1918 for the periods ending June 30, 1919, June 30, 1920, and June 30, 1921, but as to the last period beginning July 1, 1921, and

ending June 30, 1922, held that respondent was relieved from the payment of said capital stock taxes by reason of the provisions of Sections 243, 1000 (b) and 1400 (b) of the Revenue Act of 1921, and rendered judgment accordingly. (R. 43–57.) This judgment was affirmed by the Circuit Court of Appeals. (R. 173.)

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that the capital stock tax provisions of the Revenue Act of 1918 were repealed by the Revenue Act of 1921 as of January 1, 1922, without limitation.

2. In holding that the income tax imposed upon life insurance companies by Section 243 of the Revenue Act of 1921 was in lieu of the capital stock tax imposed upon such companies by Section 1000 (c) of the Revenue Act of 1918 for the period beginning July 1, 1921, and ending June 30, 1922.

3. In holding that respondent was entitled to recover the capital stock tax paid for the period beginning July 1, 1921, and ending June 30, 1922.

REASONS FOR GRANTING THE WRIT

1. The Circuit Court of Appeals in holding that Section 1000 (c) of the Revenue Act of 1918 was repealed as of January 1, 1922, without limitation, by Section 1400 of the Revenue Act of 1921, has misconstrued Section 1400, and has not given proper effect to the saving clauses therein set forth.

2. The Circuit Court of Appeals has misconstrued the "in lieu" provisions of Section 243 and the provisions of Section 1000 (b) of the Revenue Act of 1921 in holding that the income tax imposed upon life insurance companies by said Section 243 of the Revenue Act of 1921 is "in lieu" of the capital stock tax imposed upon such companies by Section 1000 (c) of the Revenue Act of 1918 for the period beginning July 1, 1921, and ending June 30, 1922.

3. The question whether or not the capital stock tax provisions of the Revenue Act of 1918 were repealed as of January 1, 1922, by Section 1400 of the Revenue Act of 1921 is one of great public interest and of great importance to the Government in the administration of these revenue laws.

4. The question whether or not the tax imposed by Section 243 of the Revenue Act of 1921 is in lieu of the capital stock tax imposed on insurance companies by Section 1000 of the Revenue Act of 1918, is likewise one of public interest and of great importance to the Government in the administration of the revenue laws.

5. There are many cases now pending in the courts and before the Treasury Department involving these questions and a final decision by this Court will establish a rule for the settlement of all of these cases.

Wherefore, it is respectfully submitted that this petition for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Second Circuit, in so far as the same is adverse to your petitioner, should be granted.

THOMAS D. THACHER,
Solicitor General.

MAY, 1930.

BRIEF IN SUPPORT OF THE PETITION

OPINIONS BELOW

The opinion of the District Court (R. 43) is reported in 34 F. (2d) 60. The opinion of the Circuit Court of Appeals (R. 165) is not yet reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on March 10, 1930. (R. 173.) Petition for rehearing was denied on April 7, 1930. (R. 178.) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the Revenue Act of 1921 repealed as of January 1, 1922, without limitation, the capital stock taxes imposed upon mutual life insurance companies by Section 1000 (c) of the Revenue Act of 1918.

2. Whether income taxes imposed upon mutual life insurance companies by Section 243 of the Revenue Act of 1921 are "in lieu" of the capital stock taxes imposed upon such companies by Section 1000 (c) of the Revenue Act of 1918 for the period beginning July 1, 1921, and ending June 30, 1922.

STATUTES AND REGULATIONS INVOLVED

These appear in the Appendix, pp. 14–19, *infra*.

STATEMENT

A statement of the facts will be found in the petition, pp. 2–3, *supra*.

ARGUMENT

The capital stock taxes imposed upon respondent under the Revenue Act of 1918 were specifically designated "special taxes."

With respect to special taxes the Act of October 1, 1890, c. 1244, Sec. 53, 26 Stat. 567, 624 (U. S. C., Title 26, Sec. 186) provides that—

> all special taxes shall become due on the first day of July * * * in each year * * * or on commencing any trade or business on which such tax is imposed. In the former case the tax shall be reckoned for one year; * * *.

Regulations duly promulgated by the Treasury Department under the Revenue Acts of 1916, 1918 and 1921 so provided. These regulations are set out in the Appendix, *infra*, pp. 17–19. Thus, the tax was payable in advance for the privilege of carrying on business for one year, and on July 1, 1921, the capital stock tax imposed upon respondent for the period ending June 30, 1922, had accrued and was due and payable.

The Circuit Court of Appeals, agreeing that the tax was payable in advance, nevertheless held that the statute was repealed for the fourth year ending June 30, 1922. In so holding we submit that the Court failed to give proper effect to the limitations contained in Section 1400 (b) of the Revenue Act of 1921.

Section 1400 (a) provides:

> That the following parts of the Revenue Act of 1918 are repealed, to take effect (except as otherwise provided in this Act) on January 1, 1922, subject to the limitations provided in subdivision (b): * * *

Subdivision (b) contains this limitation:

> The parts of the Revenue Act of 1918 which are repealed by this Act shall (unless otherwise specifically provided in this Act) remain in force for the assessment and collection of all taxes which have accrued under the Revenue Act of 1918 at the time such parts cease to be in effect * * *.

The effect of this provision is that apart from any formal repeal of the capital stock tax provisions of the Revenue Act of 1918 as of January 1, 1922, they remained in force for the purpose of validating the collection of the tax for the period beginning July 1, 1921.

Section 1000 (a) of the Revenue Act of 1921 provided that—

> on and after July 1, 1922, in lieu of the tax imposed by section 1000 of the Revenue Act of 1918—

certain taxes shall be imposed. Thus it was only after July 1, 1922, that the capital stock tax provisions of the Revenue Act of 1921 became effective, and this was intended to be " in lieu of the tax imposed by section 1000 of the Revenue Act of 1918 " only after that date and not before.

It was the evident intent of Congress to continue the capital-stock tax imposed by the Revenue Act of 1918 without interruption until the capital-stock tax imposed by the Revenue Act of 1921 became effective on July 1, 1922. But the capital-stock tax imposed by the 1921 Act was not applicable to insurance companies. In lieu thereof such companies were subjected to a special income tax by Section 243. This was in lieu of the new capital-stock tax and there is no evidence of an intent that the 1918 capital-stock tax was to end any earlier in the case of insurance companies than in the case of other companies. On the contrary, the legislative history indicates that Congress intended insurance companies to remain subject to the 1918 capital-stock tax until all companies were relieved from it by the taking effect of the new tax.

The report of the Senate Finance Committee (Senate Report No. 275, 67th Congress, 1st Ses-

sion) accompanying the Revenue Bill of 1921, contains the following (p. 20):

> Sections 242–246 provide a new plan for the taxation of life insurance companies, substantially similar to the plan embodied in the revenue act of 1918 as first adopted by the Senate. The provisions of the present law applicable to life insurance companies are imperfect and productive of constant litigation. The proposed plan would tax life insurance companies on the basis of their investment income from interest, dividends, and rents, with suitable deductions for expenses fairly chargeable against such investment income. The new tax would take the place of the present income and excess-profits taxes for the year 1921, *and life insurance companies would share with other insurance companies in the repeal in the year 1922 of the capital stock tax* and the taxes imposed by section 503. The new tax will yield a larger revenue than the taxes which it is proposed to replace. (Italics ours.)

In holding that Congress did not intend that insurance companies should be subject to the 1918 capital stock tax at a time when the new income tax imposed by Section 243 of the 1921 Act was in effect, the court below has overlooked the fact that insurance companies were specifically subjected to three different taxes at the same time by the 1918 Act. (Secs. 230, 301, 1000.)

In any event, it is clear that on July 1, 1921, before the passage of the 1921 Act, respondent came under an absolute liability to pay taxes for the privilege of carrying on its business for the ensuing year. These taxes were imposed by Section 1000 (c) of the 1918 Act and there is no intimation in the 1921 Act, passed November 23, 1921, that Congress intended any remission of the taxes theretofore due and payable. It is settled that a taxpayer has the burden of showing that he comes strictly within the language of statutes exempting from taxation and we submit that this rule of strict construction is equally applicable when a statute is relied upon to remit, by implication, a tax already due and payable. As said by the District Court (R. 50) Congressional intent to remit taxes is not lightly to be presumed. Accordingly, the District Court held that the 1921 Act did not invalidate the tax due and payable July 1, 1921. That court gave judgment for the recovery of the tax for the period July 1, 1921, to June 30, 1922, on the assumption that the tax for that period was not due until July 1, 1922, which assumption we dispute.

Section 1400 (b) of the 1921 Act contains the further limitation:

> In the case of any tax imposed by any part of the Revenue Act of 1918 repealed by this Act, if there is a tax imposed by this Act in lieu thereof, the provision imposing such

> tax shall remain in force until the corresponding tax under this Act takes effect * * *.

The Circuit Court of Appeals held that the capital stock tax was payable in advance; that the income tax imposed by Section 243 of the 1921 Act was in lieu of the capital stock tax imposed by Section 1000 of the 1918 Act, and hence that the quoted language of Section 1400 (b) was applicable. Upon this reasoning it held that since the tax imposed by Section 243 took effect January 1, 1921, the levy of the capital stock tax on July 1, 1921, was invalid.

By its terms Section 243 of the 1921 Act imposed taxes in lieu of Section 1000 of the same Act, and also in lieu of taxes imposed by Section 230 and by Title III of that Act; but there is nothing in its language which comprehends the imposition of any tax in lieu of the taxees here in question imposed by Section 1000 of the Act of 1918. One must therefore look to the corresponding Section 1000 of the Act of 1921 to find provision for the imposition of any tax which takes the place of the taxes previously imposed by Section 1000 of the Act of 1918. But Section 1000 of the Act of 1921 is effective for this purpose only on and after July 1, 1922. Thus Section 243, by its own terms, imposed no taxes in lieu of the capital stock taxes imposed by the 1918 Act which accrued and became due and payable prior to July 1, 1922. The error in the court below was in assuming that the

income tax imposed by Section 243 of the 1921 Act was in lieu of the capital stock tax imposed by Section 1000 of the 1918 Act. As by its terms that section imposed no tax in lieu of the tax here in question, Section 1400 (b) of the 1921 Act continued the provisions of Section 1000 of the 1918 Act in force until July 1, 1922, when the corresponding tax under the 1921 Act (*i. e.*, the tax imposed by Section 1000 of that Act) took effect.

CONCLUSION

Because of the importance of the questions here involved in the practical administration of the revenue laws, it is respectfully submitted that the petition for writ of certiorari should be granted.

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MAY, 1930.

APPENDIX

The pertinent provisions of the Revenue Act of 1918 (c. 18, 40 Stat. 1057, 1126) relating to capital stock taxes are as follows:

TITLE X.—SPECIAL TAXES

SEC. 1000. (a) That on and after July 1, 1918, in lieu of the tax imposed by the first subdivision of section 407 of the Revenue Act of 1916—

(1) Every domestic corporation shall pay annually a special excise tax with respect to carrying on or doing business * * *.

* * * * *

(c) * * * The taxes imposed by this section shall apply to mutual insurance companies, and in the case of every such domestic company the tax shall be equivalent to $1 for each $1,000 of the excess over $5,000 of the sum of its surplus or contingent reserves maintained for the general use of the business and any reserves the net additions to which are included in net income under the provisions of Title II, as of the close of the preceding accounting period used by such company for purposes of making its income tax return: * * *.

The pertinent provisions of the Revenue Act of 1921 (c. 136, 42 Stat. 227, 261, 294, 295, 320, 321), are as follows:

SEC. 243. That in lieu of the taxes imposed by sections 230 and 1000 and by Title III, there shall be levied, collected, and paid for the calendar year 1921 and for each taxable year thereafter upon the net income of every life insurance company a tax as follows:

(1) In the case of a domestic life insurance company, the same percentage of its net income as is imposed upon other corporations by section 230;

* * * * *.

TITLE X.—SPECIAL TAXES

CAPITAL STOCK TAX

SEC. 1000. (a) That on and after July 1, 1922, in lieu of the tax imposed by section 1000 of the Revenue Act of 1918—

(1) Every domestic corporation shall pay annually a special excise tax with respect to carrying on or doing business * * *.

* * * * *

(b) The taxes imposed by this section shall not apply in any year to any corporation which was not engaged in business * * *, nor to any insurance company subject to the tax imposed by section 243 * * *.

SEC. 1400. (a) That the following parts of the Revenue Act of 1918 are repealed, to take effect (except as otherwise provided in

this Act) on January 1, 1922, subject to the limitations provided in subdivision (b):

* * * * *

Title X (called "Special Taxes");

* * * * *

(b) The parts of the Revenue Act of 1918 which are repealed by this Act shall (unless otherwise specifically provided in this Act) remain in force for the assessment and collection of all taxes which have accrued under the Revenue Act of 1918 at the time such parts cease to be in effect, and for the imposition and collection of all penalties or forfeitures which have accrued or may accrue in relation to any such taxes. In the case of any tax imposed by any part of the Revenue Act of 1918 repealed by this Act, if there is a tax imposed by this Act in lieu thereof, the provision imposing such tax shall remain in force until the corresponding tax under this Act takes effect under the provisions of this Act. * * *

The Act of October 1, 1890, c. 1244, Sec. 53, 26 Stat. 567, 624 (U. S. C., Title 26, Sec. 186), provides in part:

That all special taxes shall become due on the first day of July, eighteen hundred and ninety-one, and on the first day of July in each year thereafter, or on commencing any trade or business on which such tax is imposed. In the former case the tax shall be reckoned for one year; and in the latter case it shall be reckoned proportionately, from the first day of the month in which the lia-

bility to a special tax commenced to the first day of July following. * * * And it shall be the duty of special tax payers to render their returns to the deputy collector at such times within the calendar month in which the special tax liability commenced as shall enable him to receive such returns, duly signed and verified, not later than the last day of the month, except in cases of sickness or absence, as provided for in section three thousand one hundred and seventy-six of the Revised Statutes.

The Regulations under the 1916, 1918, and 1921 Revenue Acts are as follows:

Regulations 38, promulgated October 19, 1916, under the Revenue Act of 1916, provided—

ART. 3. (a) Section 3237, Revised Statutes, as amended by section 53 of the act of October 1, 1890 (26 Stats., 567), provides "that all special taxes shall become due on the 1st day of July, 1891, and on the 1st day of July in each year thereafter, or on commencing any trade or business on which such tax is imposed. In the former case the tax shall be reckoned for one year, and in the latter case it shall be reckoned proportionately from the 1st day of the month in which the liability to a special tax commenced to the 1st day of July following." The capital-stock tax, therefore, which becomes effective January 1, 1917, will be payable in January, 1917, on returns to be made during that month for the six months ending June 30, 1917. In July, 1917, and annually in

July thereafter, returns must again be made and the tax paid for the ensuing fiscal year.

Regulations 38 (Revised), promulgated August 9, 1918, provided:

ARTICLE 1. *Due date.*—The tax became effective January 1, 1917, and is to be paid annually in advance for each year beginning July 1, except as to the first payment for the six months ending June 30, 1917. Special taxes, of which this is one, become due on the 1st day of July in each year, or on commencing any trade or business on which such tax is imposed. In the former case the tax is reckoned for one year, and in the latter case it is reckoned proportionately from the first day of the month in which the liability to a special tax commenced to the 1st day of July following. But see Article 11. No tax is refundable if a corporation ceases to do business during the year.

Regulations 50, promulgated under the Revenue Act of 1918, provided:

ARTICLE 1. *Due date of tax.*—The tax became effective as of July 1, 1918, and is to be paid annually in advance for each year beginning July 1, in lieu of the capital stock tax imposed by the Revenue Act of 1916. The tax for the first year ending June 30, 1919, although necessarily not payable in advance, must be paid upon notice and demand by the collector. See article 111. Special taxes, of which this is one, become due on the 1st day of July in each year, or on commenc-

ing any trade or business on which such tax is imposed. In the former case the tax is reckoned for one year, and in the latter case it is reckoned proportionately from the first day of the month in which the liability to a special tax commenced to the 1st day of July following. But see article 51. No tax is refundable if a corporation ceases to do business during the year.

Regulations 64, promulgated under the Revenue Act of 1921, provided:

ARTICLE 1. *The law.*—The main provisions of existing law with respect to this tax are embodied in section 1000 of the Revenue Act of 1921, referred to hereinafter as the act.

ART. 2. *Due date of tax.*—The act was approved November 23, 1921, but the tax is effective from July 1, 1922, except upon the incorporation of an individual or partnership business (see art. 32). This is a special tax and like all special taxes is due and payable annually in advance from July 1 of each year. No portion of the tax so paid is refundable to a corporation which ceases to do business during the year.

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